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No. 93-1421

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ROBERT M. AUS, and DAVID L. POPE,

Petitioners,

v.

ARMCO, INC., MR. A. C. WORRELL, Secretary Benefits Plan Administrative Committee, and ARMCO, INC. NONCONTRIBUTORY PENSION PLAN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS ARMCO, INC., MR. A. C. WORRELL, Secretary Benefits Plan Administrative Committee, and ARMCO, INC. NONCONTRIBUTORY PENSION PLAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS E. HAMEL
Houston, Texas
Counsel of Record

VINSON & ELKINS, L.L.P.
2839 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2036

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Armco, Inc., Mr. A. C. Worrell, Secretary Benefits Plan Administrative Committee, and Armco, Inc. Noncontributory Pension Plan (collectively "Armco"), respectfully request that the Petition for Writ

of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF THE CASE

Petitioners Aus and Pope are former employees of Armco and participants in the Armco Inc. Noncontributory Pension Plan (the "Plan") with vested retirement benefits. After they were terminated by Armco in a reduction in force, each applied to the Plan for a special retirement benefit under the Plan's Rule of 65 benefit provision, which permits participants to receive immediate retirement benefits before they reach normal retirement age, 65, or early retirement age, 55, under certain circumstances. Their application for a Rule of 65 benefit was denied by the Plan's named fiduciary the Benefit Plan Administrative Committee ("BPAC"). Aus and Pope then commenced this action against the Plan, A. C. Worrell, BPAC's Secretary and Armco, the Plan's sponsor. The relevant facts in this case, set forth fully in the opinion of the Fifth Circuit, in Petition Appendix at 3A-13A,[1] are summarized briefly.

Beginning in the early 1980's, Armco made a strategic decision to downsize and decentralize its corporate staff functions. By 1985, recognizing that its international business was not as profitable as it had hoped, Armco decided to decentralize the corporate international marketing function, Armco Trading Services ("ATS"), and

[1] References to the Petition Appendix are hereinafter referred to as "P. App."

place that function with the operating divisions such as Specialty Steel division, Encorp, and the Construction Products division. Armco directed Aus, the ATS general manager, and his managers, including Pope, to manage this decentralization of function and oversee an orderly reduction in force.

By late May 1985, the restructuring had resulted in the transfer of ATS employees to the Specialty Steel and other divisions, where they continued to perform the same core functions they performed at ATS. The employees transferred continued to work in the same locations without interruption. The employees not transferred, including Aus and Pope, were terminated in a reduction of force.

At the time of their termination, Aus and Pope, age 46, were fully vested in the Plan. As fully vested Plan participants, Aus and Pope are entitled to receive full pension benefits beginning at age 65 or actuarially reduced benefits beginning at age 55.

In addition to normal and early retirement benefits, the Plan also provides pension benefits to qualifying individuals under certain specified circumstances – the Rule of 65 benefit, set forth in Plan § 3.8, is one such provision. Directly after their termination, Aus and Pope applied for an immediate, unreduced pension benefit under this provision.

The Rule of 65 benefit was added to the Plan to provide benefits for unrepresented salaried employees in parity with hourly employees receiving benefits pursuant to collectively bargained plans as the result of a shutdown by the company. Consistent with the origin of Rule

of 65, BPAC has uniformly construed Plan § 3.8(d) as requiring a determination that the termination of employment resulted from a shutdown.

Because the decentralization of ATS into Armco's operating divisions and the concurrent reduction in force did not constitute a shutdown, as that term had been interpreted by BPAC, BPAC determined that neither Aus nor Pope qualified for Rule of 65 benefits. Aus and Pope appealed this determination.

BPAC deferred consideration of their appeals pending a study analyzing the claims in light of the express provisions of the Plan. After considering the report of the study committee, BPAC affirmed its original denial of benefits, finding that the ATS function had been assimilated into other divisions and, therefore, was more like a force reduction than a permanent closing.

Aus and Pope next challenged BPAC's determination in this lawsuit. At trial, Armco produced evidence that it had applied its requirement of a shutdown determination consistently under the Rule of 65 provision.[2] However, the district court grafted an additional requirement onto BPAC's shutdown definition: it defined the "Shutdown" as being restricted to shutdowns involving only major steel making or steel fabricating facilities, or of a significant department within such a facility. Based on its own

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[2] Petitioners Aus and Pope incorrectly state that BPAC "sometimes granted benefits in situations identical to the shutdown of Armco Tracing Services." Petition at 4-5. This statement is refuted by the record, which conclusively demonstrates that BPAC consistently applied its shutdown criterion in making determinations under Plan § 3.8(d).

definition, the district court concluded that BPAC had not applied § 3.8(d) consistently and ruled in favor of Aus and Pope. On appeal, the Fifth Circuit reversed the judgment of the district court and rendered, concluding that BPAC's focus on whether a facility was shut down "reasonably defined a 'shutdown.' " P. App. at 20A. In concluding that BPAC did not abuse its discretion, the court further observed that BPAC's interpretation of the Plan was internally consistent, its factual findings supported its decision, and that Aus and Pope had presented little, if any, evidence of bad faith. P. App. at 24A-25A.

SUMMARY OF THE ARGUMENT

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), overruled only the wholesale application of arbitrary and capricious review in reviewing ERISA plan determinations; it did not require the abandonment of well-established factors used to guide judicial analysis when an abuse of discretion review is appropriate. The Fifth Circuit's two-step abuse of discretion review constitutes an inquiry into the reasonableness of a plan administrator's plan interpretation consistent with the requirements of *Firestone*. In addition, the Fifth Circuit's inquiry incorporates consideration of whether a conflict of interest exists, both by examining the specific language of the plan and the factual background of the determination.

In this case, the Fifth Circuit's analysis, informed by its two-step analysis as restated in *Wildbur v. ARCO Chem.*

Co.,[3] addressed the propriety of the Plan administrator's determination and observed the absence of any significant evidence of a lack of good faith. Accordingly, the Fifth Circuit correctly addressed the issues of reasonableness and conflict of interest as directed in *Firestone* in deciding this case.

REASONS FOR DENYING THE WRIT

A. The Fifth Circuit's abuse of discretion review complies with the dictates of this Court.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court disapproved the wholesale importation of the arbitrary and capricious standard to review the benefit eligibility determinations of employee benefits plan administrators under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* *Id.* at 109. *Firestone* held that courts should review under a *de novo* standard unless the plan expressly gives the plan administrator discretionary authority to make eligibility determinations or interpret plan terms. *Id.* at 115. When the plan confers discretionary authority on plan administrators, their decisions are subject to an abuse of discretion review. *See id.* This Court explained that while conflict of interest is a factor to consider, the appropriate application of each standard of review relies on the terms of the plan, not on whether the plan administrator operated under a conflict of interest. *Id.*

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[3] 974 F.2d 631, 637, *clarified*, 979 F.2d 1013 (5th Cir. 1992).

Since *Firestone*, the Fifth Circuit has considered the continued vitality of the two-step approach first enunciated in *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982), to guide its analysis under the abuse of discretion standard applicable to review a plan interpretation of an ERISA plan administrator when the plan expressly confers the administrator discretionary authority to interpret its terms. *See Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 637, *clarified*, 979 F.2d 1013 (5th Cir. 1992); *Batchelor v. International Bhd. of Elec. Workers Local 861*, 877 F.2d 441, 444-45 (5th Cir. 1989). The Fifth Circuit and other circuits have recognized that *Firestone* does not require the reviewing court to abandon its conceptual framework for an abuse of discretion analysis when that standard of review is appropriate. *See, e.g., Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556, 1560 n.4, 1570 (11th Cir. 1990) (citing cases and applying Fifth Circuit's two-step inquiry); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1185 (4th Cir. 1989) (recognizing that while this Court prescribed rules for review of ERISA benefit denials which supplanted the lower court approaches, it did not reject all the concepts of review embodied in those approaches);[4] *Batchelor*, 877 F.2d 441, 444-45 & n.10 (5th Cir. 1989) (using *Dennard* as guidance while recognizing that *Firestone* requires an abuse of discretion review).

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[4] The suggestion in the Petition that *De Nobel* recognized that *Firestone* overruled *Dennard* mischaracterizes the Fourth Circuit's opinion, which suggests that the factors cited in *Dennard* remain appropriate tools for analysis after *Firestone*. *See* 885 F.2d at 1185, 1188.

Aus and Pope's arguments rest on semantic, rather than substantive, distinctions. *Firestone* does not attach any talismanic significance to the words "reasonable" and "conflict of interest," just as it does not designate any other "magic word[s]." *Cf. Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992) (Ginsburg, J.) (plan need not contain word "discretion" to trigger application of abuse of discretion review).

The analytical framework employed by the Fifth Circuit encompasses inquiries into both reasonableness and conflict of interest. First, the *Dennard* factors provide an appropriate framework for inquiry into the reasonableness of plan term construction as required by *Firestone*. *See De Nobel*, 885 F.2d at 1188 (citing *Dennard* among other pre-*Firestone* cases as providing guidance for a reasonableness inquiry entailed in an abuse of discretion review); *Dennard*, 681 F.2d at 314 (first step of analysis requires inquiry into " 'fair reading' *and reasonableness of that reading*") (emphasis added).

Second, the Fifth Circuit has recognized that it must weigh as a factor any evidence of a conflict of interest when reviewing for an abuse of discretion. *See, e.g., Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1337 (5th Cir. 1994); *Jones v. Sonat, Inc. Master Employee Benefits Plan Admin. Comm.*, 997 F.2d 113, 116 (5th Cir. 1993) (quoting *Brown*, 898 F.2d at 1566-67); *Wildbur*, 974 F.2d at 638 (explaining that "inquiry into factual background of a determination and any inferences of lack of good faith," as required by *Dennard*, entails consideration of any conflict of interest); *Lowry v. Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 525 & n.6 (5th Cir.) (evidence of partiality affects stringency of review), *cert. denied*, 493 U.S. 852 (1989); *see*

also Dennard, 681 F.2d at 316 ("Consistency of the administrator's or trustee's interpretation of a provision with the remainder of a plan is one indication of good-faith."). These cases clarify that the Fifth Circuit's abuse of discretion review encompasses consideration of whether a conflict of interest exists.[5]

Accordingly, the Fifth Circuit properly views the *Dennard* factors as appropriate tools for review. *See Wildbur*, 974 F.2d at 637.

B. The Fifth Circuit's abuse of discretion review comports with those of other courts of appeals.

Because the two-step *Dennard* analysis amounts to an inquiry into the reasonableness of an ERISA plan administrator's decision as mandated by *Firestone*, it comports

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[5] No case suggests that the Fifth Circuit has not considered a conflict of interest when the facts have raised the issue. *See, e.g., Haubold*, 11 F.3d at 1341 ("In light of this evidence, our own reading of the plans, and after careful consideration of the actual conflicts of interest under which the plan administrator was acting, we are persuaded that the plan administrator gave the plans their legally correct interpretation."); *see also Wildbur*, 974 F.2d at 638 (" 'a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries' ") (*quoting Brown*, 898 F.2d at 1566-67)). This treatment belies Petitioner's concern that the Fifth Circuit would let evidence of a conflict of interest go unaddressed. Further, *Dennard* itself demonstrates that the court addresses the conflict of interest issue in the first step of its analysis. *See* 681 F.2d at 316.

with the approaches used in other circuits properly following *Firestone*. Accordingly, rather than conflicting with *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1185 (4th Cir. 1989), *Block v. Pitney Bowes*, 952 F.2d 1450 (D.C. Cir. 1992), or *Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556 (11th Cir. 1990), as suggested by Aus and Pope, the Fifth Circuit's inquiry harmonizes with the approaches used in these other circuits.

In fact, the Fourth and Eleventh Circuits explicitly note their congruence with the thrust of the Fifth Circuit's approach. *See De Nobel*, 885 F.2d at 1188 (expressly recognizing *Dennard* as involving an inquiry into the reasonableness of a plan administrator's decisions); *Brown*, 898 F.2d at 1566-67 & n.12, 1570. Moreover, the Fifth and District of Columbia Circuits both exhibit the same general philosophy toward the shift from arbitrary and capricious to abuse of discretion review in this context. *Compare Wildbur*, 974 F.2d at 635 n.7 (detecting only a semantic, not a substantive, difference in labels) *with Block*, 952 F.2d at 1454 (Ginsburg, J.) (distinction, if any, is subtle; no need to adopt one phrase and avoid the other).

Firestone did not address the question whether the abuse of discretion standard applies to review the factual determinations of ERISA plan administrators. *See Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1561-62 (5th Cir.), *cert. denied*, 112 S. Ct. 453 (1991). The court of appeals decision cited by Aus and Pope as evidence of inconsistency involved a review of a factual determination leading to the termination of benefits, not a challenge to a plan interpretation. *See Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1015 (5th Cir. 1992); *see also Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1309 (5th Cir. 1994)

(evidence supported administrator's finding; plaintiff failed to present evidence to refute medical opinion that he was capable of sedentary to light work); *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1100-01 (5th Cir. 1990) (sufficient evidence supported plan administrator's finding that employee was not laid off). Because the *Dennard* factors apply only to review plan interpretations,[6] there is no reason for them to have appeared in *Salley*. When the issue before the court has involved plan interpretation, as in this case, the Fifth Circuit Court of Appeals has applied the *Dennard* analysis as a tool to aid in its abuse of discretion review.[7]

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[6] *See generally Wildbur*, 974 F.2d at 641-42 (distinguishing between factual determinations and plan interpretation).

[7] While the Fifth Circuit recently has declared that it is not bound to apply the *Dennard* inquiry in every case, see *Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1307 n.3 (5th Cir. 1994), it nonetheless has done so in this case and all prior cases when confronted with the challenge that a plan administrator abused its discretion in interpreting plan terms. *See, e.g., Jones*, 997 F.2d at 115-16; *Wildbur*, 974 F.2d at 637-38. In *Duhon*, the disagreement among the panel appears to stem from how they construe the issue on appeal: the majority focuses on the factual determination in light of the clear language of the plan, but the dissent confronts the administrator's plan language interpretation. *Compare* 15 F.3d at 1307 & n.3 (majority) *with id.* at 1309, 1310-11 (dissent). The majority conducted an abuse of discretion review relying on the reasoning of then-Judge Ruth Bader Ginsburg in *Block*, 952 F.2d at 1450. *See Duhon*, 15 F.3d at 1308-09.

C. The Fifth Circuit correctly applied the standard of review mandated in *Firestone* to this case.

Because Aus and Pope challenged BPAC's interpretation of the Rule of 65 provision, the court applied the *Dennard* inquiry, as restated in *Wildbur*, to review BPAC's decision in this case. The court of appeals, proceeding from the parties' agreement that the "shutdown" requirement was reasonable, concluded that BPAC uniformly construed its shutdown provision. The court next determined that historical and pragmatic reasons made BPAC's construction of the shutdown requirement consistent with a fair reading of the Plan. In applying the final inquiry under the first step of its analysis, the court observed that a more liberal construction of the shutdown criterion than that actually used by BPAC would have resulted in significant unanticipated costs. In light of these considerations, the court concluded that Aus and Pope were denied benefits under a "legally correct" interpretation of the Plan. P. App. 20A-24A.

In declaring that BPAC had not abused its discretion in denying Rule of 65 benefits to Aus and Pope, the court added that BPAC's plan interpretation was internally consistent, its decision was made after a thorough analysis, and little, if any, evidence of bad faith appeared in the record. P. App. 24A-25A. The court's careful consideration of these various factors, as guided by *Wildbur*'s articulation of the *Dennard* analysis, exhibits an inquiry into whether BPAC's interpretation was reasonable and whether a conflict of interest existed. Accordingly, the Fifth Circuit's abuse of discretion analysis in this case complies with the requirements of *Firestone*.

Finally, Aus and Pope express fear that the application of *Dennard* test may yield the conclusion that a plan interpretation, while legally incorrect, does not amount to an abuse of discretion. *Firestone* does not mandate the conclusion that a legally incorrect plan interpretation, without more, constitutes an abuse of discretion. This case does not present the issue, nor do Aus and Pope point to any case which does. Accordingly, this concern fails to present a cognizable issue pursuant to Rule 10 of the Supreme Court.

CONCLUSION

Guided by the analytical framework first enunciated in *Dennard*, the Fifth Circuit properly considered whether BPAC abused its discretion in denying special retirement benefits to Aus and Pope. Aus and Pope's petition for writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS E. HAMEL
Houston, Texas
Counsel of Record

VINSON & ELKINS, L.L.P.
2839 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2036

Counsel for Respondents